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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE NORTH HAVEN BOARD OF EDUCATION, *Petitioner*,

v.

TERREL BELL, *et al.*, *Respondents*,

and

THE TRUMBULL BOARD OF EDUCATION, *Petitioner*,

v.

UNITED STATES DEPARTMENT OF EDUCATION AND LINDA POTZ, *Respondents*.

On A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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REPLY BRIEF FOR PETITIONERS NORTH HAVEN BOARD OF EDUCATION AND TRUMBULL BOARD OF EDUCATION

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TABLE OF CONTENTS

		Page
Table of Authorities.....		ii
I.	The Secretary of Education Has Recognized the Validity of Petitioners' Challenge....	1
II.	The Weakness of Respondents' Arguments Is Shown By Their Undue Reliance on the Ambiguous Remarks of Sen. Bayh.....	9
III.	These Are Not Infection Regulations.....	15
IV.	The Regulations Are Invalid Because They Are Not Program Specific.....	18
V.	The Justice Department Position Lacks Merit From A Policy Standpoint.....	23
	Conclusion.....	27

TABLE OF AUTHORITIES

Cases	Page
1. Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1972), 356 F. Supp. 92 (D.D.C.), aff'd in pertinent part, 480 F.2d 1159 (D.C. Cir. 1973)	26
2. Davis v. United Air Lines, Inc., D.N. 81-7093, slip op. (2d Cir. Sept. 17, 1981)	6, 10
3. Dougherty County School System v. Harris, 622 F.2d 735 (5th Cir. 1980), cert. pending, No. 80-1023	24
4. National Independent Meat Packers Assoc. v. U.S.E.P.A. 566 F.2d 41 (8th Cir. 1977)	10
5. Pennhurst State School v. Halderman, __ U.S. __, 49 U.S.L.W. 4363 (1981)	8, 9
6. Romeo Community Schools v. HEW, 438 F. Supp. 1021 (E.D. Mich. 1977), aff'd, 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979)	16
7. Southeastern Community College v. Davis, 442 U.S. 397 (1979)	6
8. United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966), aff'd en banc, 380 F.2d 385, cert. denied, 389 U.S. 840 (1967)	14, 17, 18
9. University of Texas v. Camenisch, __ U.S. __, 49 U.S.L.W. 4468 (1981)	7

Statutes & Regulations

Page

1. 20 U.S.C. § 1681.....passim
2. 42 U.S.C. § 2000d.....passim
3. 40 Fed. Reg. 24148 (1975).....26
4. 34 C.F.R. § 106.11.....20
5. 34 C.F.R. § 106.51.....21
6. 34 C.F.R. § 106.51(a).....6, 8, 19

Legislative History

1. 117 Cong. Rec. 30157-8 (1971).....12
2. 118 Cong. Rec. 5803 (1972).....9, 10
3. 118 Cong. Rec. 5807 (1972).....9, 10, 11

Other

1. Daily Labor Report, No. 150, August 5, 1981, p. A-5..... 1, 2, 3, 4 13, 17

Law Review Articles

1. Comment: "Title IX: Employment Discrimination in Education - North Haven Board of Education v. Hufstedler", 15 Geo. L. Rev. 451 (1981).....25, 27
2. Simpson, "Sex Discrimination in Employment Under Title IX", 48 U. Chi. L. Rev. 462 (1981)....24

I. The Secretary of Education Has Recognized the Validity of Petitioners' Challenge

Subsequent to the filing of Petitioners' Brief, the Department of Education reexamined the regulations here in question and recognized the wisdom of the unanimous case law, other than the decision below, declaring the regulations at issue here to be invalid. This is set out in a published letter by the Secretary of Education to the Justice Department which states in part:

> I have reviewed the Department of Education's employment regulations, 34 C.F.R. Part 106, Subpart E, under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq. (1976), and have decided that they are ultra vires. I believe Title IX's

protection of beneficiaries of federally-assisted education programs was intended by Congress to parallel the protection afforded those same beneficiaries under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. Accordingly, I propose to amend the Title IX regulations concerning employment so that they parallel the Department's employment regulations under Title VI, 34 C.F.R. 100.3(c). Thus, the Title IX regulations would be amended to cover employment matters only when the complaint shows a clear nexus between the alleged employment discrimination and discrimination against the students, or when the complaint shows that the complainant is a beneficiary of a program in which a primary objective of the Federal financial assistance is to provide employment. The enclosed Notice of Proposed Rulemaking (NPRM) has been drafted to implement this proposal. This NPRM will be submitted, under separate cover, to Mr. James T. Turner, Acting Assistant Attorney General, Civil Rights Division, for your Department's approval pursuant to Executive Order 12067 (June 30, 1978) and Executive Order 12250 (November 2, 1980).

Daily Labor Report, No. 150, August 5, 1981, p. A-5.

The Secretary further noted in that letter that employment discrimination is dealt with in Title VII:

> This proposal will not diminish the Federally protected rights of persons to be free from discrimination, on the basis of sex, in employment because these rights are assured by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e (1976). In fact, this NPRM was drafted to complement the proposed rule, "Employment Discrimination: Procedure for Handling Complaints," published jointly by your Department and the Equal Employment Opportunity Commission at 46 Federal Register 22395 (April 17, 1981).

Id.

In view of the foregoing, the Secretary requested that the Justice Department not defend these actions:

> I do not wish to oppose the North Haven Board of Education's proceedings before the Supreme Court in

> North Haven Board of Education v. Bell, 629 F.2d 773 (2d Cir. 1980), cert. granted, 49 U.S.L.W. 3595 (Feb. 25, 1981) (No. 80-986). I am, therefore, requesting that the Solicitor General's office attempt to reach an agreement with the petitioners and with the respondent, Linda Potz, to dismiss this case. If an agreement cannot be reached, it probably would be advisable to file the necessary papers with the Supreme Court to ensure that the Government's brief will be in harmony with our new NPRM. The enclosed NPRM should form the basis for our brief in North Haven, if one is necessary, and for our request for extension.
>
> I would also like to request that our petitions for certiorari in Seattle University v. ED., 621 F.2d 992 (9th Cir. 1980), cert. granted, 49 U.S.L.W. 3409 (Dec. 1, 1980) (No. 80-493) and Bell v. Dougherty County School System, 622 F.2d 735 (5th Cir. 1980), pet. for cert. filed, 49 U.S.L.W. 3589 (Dec. 22, 1980) (80-1023), be dismissed and withdrawn, respectively.

Id.

The Department of Justice, however, has proceeded, at least in

part[1], to attempt to defend the validity of the Subpart E regulations, despite the repudiation of these regulations by all the courts which have considered their validity except the court below, the repudiation now by the Department which administers them, and its concession that "[t]he Department of Education has only limited expertise in employment matters." (Brief for the Federal Respondents, hereinafter "Justice Department Brief", p. 37, n. 26.)

In view of this, as the Justice Department Brief recognizes (p. 37, n. 26), it can no longer be argued that the regulations should be sustained in deference to the agency's judgment.

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[1]The Justice Department stops just short of conceding the invalidity of the regulations insofar as they fail to implement the "program specific" limitations contained in Title IX. See Section III, infra.

See Southeastern Community College v. Davis, 442 U.S. 397, 412, n. 11 (1979).[2]

Indeed, because of obvious differences between the provisions of the statute and corresponding provisions of the regulations, compare e.g. § 901 with 34 C.F.R. § 106.51(a), petitioners

[2]In fact, it would appear that if the agency had expressed its current position to the Second Circuit, the result might have been different. See Davis v. United Air Lines, Inc., D.N. 81-7093, slip op. at 4872 (2d Cir. Sept. 17, 1981) where the author of the opinion below, writing for the court, indicated that in the decision below herein, the court gave weight to the "long-held, firmly established, well-reasoned position that the agency has made known to Congress and to the courts over the years. . . ." The court contrasted this with the situation in Davis, where the OFCCP had abandoned a prior position it had taken construing the Rehabilitation Act, just as the Department of Education has now done here as to the issues in this case.

contend that such regulations could not have been sustained, even under the doctrine of agency discretion, See University of Texas v. Camenisch, ____ U.S._____, 49 U.S.L.W. 4468, 4471 (1981) (Burger, C. J., concurring) [Agency lacks "authority to rewrite the statutory scheme by way of regulations".][3]

Now that the agency has proposed to revise the regulations to conform them to the statute, any deference to agency expertise should lead to the conclusion that the agency should be free to proceed with its proposed revisions to the regulations.

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[3] The language of the regulations as presently written contrasts sharply with the statutory language, in that the regulations add coverage for employment, and provide such coverage for all programs in institutions receiving or benefitting from Federal financial assistance, rather than only for education programs and activities receiving Federal financial assistance.

(footnote continued on next page)

Moreover, when seventeen out of eighteen court decisions and the agency administering a set of regulations all conclude that such regulations are invalid, it would appear prima facie that the regulations should be declared invalid in view of the principle that "if Congress intends to impose a condition on the grant of

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§ 901 provides in relevant part:

> "No person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

However, 34 C.F.R. § 106.51 (a) provides in relevant part:

> "(a) General. (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefore, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance." (Emphasis added.)

federal moneys, it must do so unambiguously." Pennhurst State School v. Halderman, ___ U.S. ___, 49 U.S.L.W. 4363, 4367 (1981).

II. The Weakness of Respondents' Arguments Is Shown By Their Undue Reliance on the Ambiguous Remarks of Sen. Bayh

The weakness of the respondents' case is also indicated by the central weight they place on ambiguous floor remarks of Sen. Bayh, claimed to show that § 901 of Title IX was directed at employment discrimination. This effort does not adequately explain the repeated, clear-cut statements by Sen. Bayh to the effect that the relevant provisions of Title IX were "parallel to those found in Title VI of the 1964

Civil Rights Act." See, e.g., 118 Cong. Rec. 5803, 5807 (1972).[4]

Under the respondents' construction, § 901 covers employment per se, in stark contrast to § 601 of Title VI. If this be the proper construction, one would have expected that in view of the statement noting the similarity between Title IX and Title VI, Sen. Bayh

[4] It also fails to adequately reflect the principles that a "reading of the legislative history must be done with an enlightened judicial eye, giving full attention to the underlying congressional purpose, the very heart of statutory analysis", see Davis v. United Air Lines, Inc., supra, D.N. 81-7093, slip op. at 4864 (2d Cir. Sept. 17, 1981), that there should be "a healthy skepticism of 'casual statements from floor debates'", Id., and that any ambiguity should have been resolved by the Second Circuit in a manner which would have avoided "decisions [which] would present different interpretations of federal law intended to be uniformly applied on a nationwide scale." National Independent Meat Packers Assoc. v. U.S.E.P.A., 566 F.2d 41, 43 (8th Cir. 1977).

would have noted that there was a key difference between Title VI and Title IX, or referred to the fact that under Title IX, HEW (in addition to the EEOC) would have general authority over employment, or argued in favor of the need for the right to cut off students' funds where there was employment discrimination. He noted none of these points.[5]

Indeed, reflecting the weakness of its argument, the Justice Department feels compelled to use two negatives in arguing that Sen. Bayh's statements "do not appear to

[5]In fact, in the sentence immediately following Sen. Bayh's six word reference to employment in part A of his prepared statement concerning the scope of his amendment, which the Justice Department has referred to in its Petition for a Writ of Certiorari in United States Department of Education v. Seattle University, No. 90-493, p. 16, as the "clearest expression of the intent of the amendment", Sen. Bayh reemphasized that these provisions "have been tested under Title VI of the 1964 Civil Rights Act." 118 Cong. Rec. 5807 (1972).

reflect a view that his amendment would not cover employment discrimination." (Justice Department Brief, p. 22.)

As has been noted, most courts which have considered the impact of Sen. Bayh's statements have concluded that Title IX included proposed amendments to Title VII and the Equal Pay Act and that references to employment can be assumed to refer to those amendments.[6]

Moreover, if the references to employment by Sen. Bayh in the context of Title IX are deemed to refer at all to § 901, they should be construed as consistent with Secretary Bell's

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[6]Sex discrimination in employment was addressed in Sen. Bayh's amendment as proposed in 1971 by the portion of the amendment that would have established a commission to recommend further legislation. At the same time, Sen. Bayh inserted into the Congressional Record a copy of a presidential task force report urging, inter alia, amendments to Title VII and the Equal Pay Act. 117 Cong. Rec. 30157-30158 (1971).

conclusion that "Title IX's protection of beneficiaries of federally-assisted education programs was intended by Congress to parallel the protection afforded those same beneficiaries under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d." Daily Labor Report, No. 150, supra, p. A-5. Such a construction would be in accordance with the concept that Title VI permits "elimination of racial discrimination in employment or assignment of teachers, at least where such discrimination affected the educational opportunities of students", as indicated by Sen. Humphrey's statements explaining § 601 prior to the addition of § 604. (Quoted in Justice Department Brief, p. 34.)[7]

[7]Senator Humphrey's statements clearly show that he considered employment as covered by § 601 only where needed

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Such a construction is more reasonable than the attempted repudiation by the Justice Department of the construction given to the § 601 language by its floor leaders, by the Robert Kennedy Justice Department, and by courts which construed it both before and after enactment of Title IX.[8]

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to remedy discrimination against students. The statements by the Justice Department, Congressional supporters of Title VI and subsequent case law confirm this unambiguously and without exception. (See Petitioners' Brief, pp. 31-39.)

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[8] See, e.g., United States v. Jefferson County Board of Education, 372 F.2d 836, 882-883 (5th Cir. 1966), aff'd en banc, 380 F.2d 385, cert. denied, 389 U.S. 840 (1967), noting that "Congress did not, of course, intend to provide a forum for the relief of individual teachers who might be discriminatorily discharged . . . " and quoting Sen. Humphrey's statement that § 604, excluding agency action directed at employment, "made no changes in substance in Title VI."

III. These Are Not Infection Regulations

Several of the briefs filed by respondents and *amici* seek to demonstrate from the "facts" of these cases - i.e. allegations of the complainants which have not yet been the subject of any hearing and which neither respondent has thus far had an opportunity to challenge - that claims could be framed which would show that discrimination against complainants resulted in discrimination against students. Since the instant litigation merely seeks to address the validity of Subpart E of the present regulations, the issue of whether some kind of "infection" theory might be maintained under other parts of the Title IX regulations which deal with students, or regulations yet to be promulgated, or in complainants' private suits under § 901 of Title IX which are

pending in the District of Connecticut, is not at issue.

As the court succinctly stated in Romeo Community Schools v. HEW, 438 F. Supp. 1021, 1035 (E.D. Mich. 1977), aff'd, 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979), in discussing the fact that Subpart E is not an "infection" regulation:

> This deficiency is fatal to defendant's "infection" argument, for the regulations must be judged as written. This court has neither the power nor the inclination to rewrite these regulations by construing their coverage of employment practices as reaching only situations where sex discrimination against students in affected programs has resulted. Defendant's Subpart E regulations are plainly focused on employment practices per se. To judicially engraft onto each of them an implicit requirement of infection would not merely provide a saving limitation on their coverage, it would substantially alter their meaning and effect.

Hence, petitioners contend here that the regulations in question are invalid and cannot be applied to employment, predicated on discrimination against students, unless they are amended to "cover employment matters only when the complaint shows a clear nexus between the alleged employment discrimination and discrimination against the students. . . ." See Letter of Secretary Bell, Daily Labor Report, No. 150, supra, p. A-5. Moreover, in view of the express remedies under Title VII and the Equal Pay Act, such remedies should normally be deemed adequate to redress claims of employment discrimination, and thereby alleviate any resultant effects on students, consistent with the general rule in effect under Title VI that in enacting § 601, "Congress did not, of

course, intend to provide a forum for the relief of individual teachers who might be discriminatorily discharged . . . ." See United States v. Jefferson County Board of Education, supra, at 882.

IV. The Regulations Are Invalid Because They Are Not Program Specific

In contrast to its position below and the position adopted by the Second Circuit, the Justice Department has, in this Court, acknowledged the validity of certain portions of the decisions of the district court.

Specifically, the Justice Department now acknowledges that "the district court properly noted [that] Title IX is a 'program-specific' statute", that "under the terms of Section 901, discrimination on the

basis of sex is prohibited only in any 'education program or activity receiving Federal financial assistance'", and that any fund termination "must be limited to the 'particular program, or part thereof' in which noncompliance with implementing regulations has been found." (Justice Department Brief, p. 43.)

Given these admissions by the Justice Department, it would seem clear that 34 C.F.R. 106.51(a), providing that Subpart E covers "any education program or activity operated by a recipient which receives or benefits from Federal financial assistance", and extending coverage to "all employment decisions in any education program or activity operated by such recipient" (emphasis added), is invalid as contrary to the specific statutory "program specific"

limitations contained in §§ 901 and 902.[9]

However, rather than stipulate reversal as requested by the Secretary of Education, the Justice Department seems to suggest that the regulations can "plausibly" be construed as not meaning what they plainly say but rather can be read as limited to a particular program or activity. (Justice Department Brief, p. 45.)

In addition to ignoring the plain meaning of the language used in the regulations, which contrasts so obviously with the statutory language, a problem with the Justice Department's suggestion is that this new Justice

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[9]Also invalid is that statement in 34 C.F.R. § 106.11 which provides inclusively that the Title IX regulations apply "to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance" (Emphasis added.)

Department view is contrary to the all-encompassing construction of these regulations which the Justice Department admits has in fact been advocated and applied in these and other cases. (Justice Department Brief p. 46.) (See, e.g., Respondents' Appendix, p. 11 [no investigation in North Haven of program specific aspect], pp. 33-34 [finding in Trumbull does not refer to whether Potz was employed under a Federal program nor does it otherwise deal with program specific requirement of statute], p. 35 [all-encompassing § 86.51 (predecessor of 34 C.F.R. §106.51) applying Subpart E to any education program or activity operated by a recipient cited as the "applicable regulation" in Trumbull complaint].)[10]

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[10]The lengths to which the Department of Education has gone in ignoring the

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Hence, it should be clear that petitioners are entitled to a declaration that the regulations are invalid, in that they ignore the program specific requirement of the statute. Further, it seems clear that this Court should address and correct the erroneous statement by the Second Circuit Court of Appeals on this point rather than ignore it as dictum, as the Justice Department suggests. (See Justice Department Brief, p. 49, n. 37.) This would then allow the Secretary of Education to promulgate new regulations with reference to those subject matters which are properly covered by § 901 of

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program specific limitations of this statute is probably best illustrated by the case of amicus Hillsdale College, which refuses all federal money, but which has been subjected to regulation under Title IX.

Title IX, setting forth a proper program specific requirement, in addition to omitting broad based employment coverage.[11]

V. The Justice Department Position Lacks Merit From A Policy Standpoint

[11]Since the regulations presently contain no program specific requirement, it should not be necessary for this Court to address precisely how such requirement should be interpreted after incorporation into the regulations. However, if the Court does wish to consider the scope of the program specific requirement at this time, then petitioner would urge it to reject the Justice Department's proposed standard which would give the Department of Education the power to prohibit discrimination on the basis of sex in both education programs or activities that receive federal financial assistance and those that are "affected" by such federally assisted programs. See Justice Department Brief, p. 49, n. 37. This would trivialize the statutory program specific limitation, since it could be claimed that everything is "affected" by federal programs. Rather, the coverage should be limited as provided in § 901 to

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The Justice Department contends that "[u]nder [petitioners'] reading [of § 901], school districts and universities are free to discriminate, on the basis of sex, against persons employed in their federally assisted education programs and activities ..." (Justice Department Brief, p. 13.)

Since Title VII and the Equal Pay Act do proscribe such discrimination, this statement is of course totally inaccurate.

To the contrary, what has become apparent is that the excessive

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education programs or activities receiving federal funds and, pursuant to § 902, any cutoff of funds should be limited to the funding of the "particular program or part thereof" involved. Cf. Dougherty County School System v. Harris, 622 F.2d 735 (5th Cir. 1980), cert. pending, No. 80-1023; Simpson, "Sex Discrimination in Employment Under Title IX", 48 U. Chi. L. Rev. 462, 475-477 (1981). Also, of course, the regulations should not cover employment per se.

duplication of administrative jurisdiction conjured up by HEW has led to a system which "results not only in an overlap, but in a duplication of administrative and judicial proceedings." See Comment: "Title IX: Employment Discrimination in Education - North Haven Board of Education v. Hufstedler", 15 Geo. L. Rev. 451, 467 (1981).

Moreover, the apparent recognition by respondents that student fund termination is not a particularly appropriate way to deal with individual employee grievances (see Respondent Potz' Brief pp. 26-27; Justice Department Brief, p. 37, n. 26) confirms that there is little, if any, conceivable advantage to having an employee file a grievance with a Department which now admits that it has no expertise in employment matters, and which, over the

years, has consistently acknowledged its inability to process such complaints in a timely and effective manner. See 40 Fed. Reg. 24148 (1975) [wherein HEW acknowledges its inability to handle workload in this area]; Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1972), 356 F. Supp. 92 (D.D.C.), aff'd in pertinent part, 480 F.2d 1159 (D.C. Cir. 1973) [court attempt to force HEW to end its inadequacy in handling discrimination cases.]

Therefore, it is respondents' reading, not petitioners', which has led to a system which risks being ineffective in redressing employment discrimination based on sex in the educational context, and which results in a proliferation of complaints which impedes rational efforts to resolve these kinds of claims in a timely manner.

In view of the foregoing, "[a] decision to exclude the area of employment discrimination from the purview of Title IX should not be construed as an expression of congressional or judicial disregard for the necessity of assuring equality of opportunity in the area of educational employment. Rather, it is a realization that the administrative and judicial methods appropriate for dealing with one situation are not necessarily adequate or desirable when addressing another." See Comment: "Title IX· Employment Discrimination in Education - North Haven Board of Education v. Hufstedler", supra at 468.

CONCLUSION

In enacting Title IX. Congress intended to protect employees from sex discrimination through Title VII and the Equal Pay Act and to protect students as under § 601 of Title VI. It

did not intend to designate HEW as a duplicate EEOC. It did not intend to permit cutoff of student funds to redress individual grievances. It did not intend to create a labyrinth of remedies which would interminably delay the resolution of employment complaints and clog the administrative process to the point where it is unable to sort out the valid complaints from the specious ones, thereby delaying or denying justice to those with valid complaints.

Seventeen out of eighteen decisions which have considered the validity of the Subpart E regulations including the decisions of Judge Ellen Bree Burns herein, have agreed that they are invalid. Now, the Secretary of Education has indicated agreement.

Accordingly, it is respectfully requested that the decision of the United States Court of Appeals for

the Second Circuit herein be vacated, and the decisions and judgments of Judge Ellen Bree Burns of the United States District Court for the District of Connecticut be reinstated.

Respectfully submitted.

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